IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 11TH JULY 2007 / 20TH ASHADHA 1929

CRL.A.No. 186 of 2007()

SC.412/2001 of ADDL.SESSIONS COURT-TRIAL OF ABKARI ACT CASES,NEYYATTINKARA

.....

APPELLANT/ACCUSED:

JAYAKUMAR, C.NO.7775,
CENTRAL PRISON,
THIRUVANANTHAPURAM.

BY ADV. INNOCENT FRANCIS PAPPALI [STATE BRIEF]

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 186 OF 2007

Dated this the 11th day of July, 2007

JUDGMENT

The accused in S.C. No.412 of 2001 on the file of the Additional Sessions Court (trial of Abkari Act Cases), Neyyattinkara is the appellant. He faced trial for the offence punishable under Section 58 of the Abkari Act.

2. The prosecution case against the appellant was that on 19.8.1997 while the Assistant Excise Inspector of Amaravila Excise Range was on patrol duty, he found the accused in possession of 5 litres of arrack in a black jerry can at Vellarada Kudappanamoodu-Kuttappu road near Kuttappu junction, Kovilloor desom. To prove the case against the accused, the prosecution examined PWs.1 to 6 and produced Exts.P1 to P7 as well as MO.1 can. On the side of the defence, DW.1 was examined, but no documents were produced. After closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. Denying the allegations levelled against him, the accused stated that the excise officials

had foisted the case against him. However, after considering the entire evidence, the trial court found the accused guilty of the offence charged against him, convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of three months. Challenging the above conviction and sentence, this appeal is filed.

3. This appeal is filed through the jail authorities and the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has taken the following contentions: (i) the trial court went wrong in placing reliance on the evidence of PWs.3, 4 and 5 who were official witnesses since the independent witnesses, PWs.1 and 2, turned hostile to the prosecution, (ii) PW.4, the Assistant Excise Inspector had not followed the provisions of the Abkari Act and the Kerala Excise Manual while detecting the crime and seizing MO.1 can from the accused as he had not taken any sample from MO.1 can, (iii) though the independent witnesses who were examined during seizure siged Ext.P1 mahazar, they stated that they did

not know the contents of Ext.P1 and (iv) the trial court committed serious error in finding that the appellant committed offence punishable under Section 58 of the Abkari Act on the basis of Ext.P6 chemical analysis report.

5. The trial court mainly relied on the evidence of PWs.4 and 3. PW.4 was the Assistant Excise Inspector who detected the crime. He deposed that on the date of the incident he saw the accused at the place of occurrence with MO.1 jerry can containing 5 litres of arrack and that after questioning him MO.1 was seized in the presence of independent witnesses on preparing Ext.P1 mahazar. This witness further stated that the accused was arrested after issuing Ext.P2 arrest memo and the contraband articles were produced before the court below. PW.3 was the Preventive Officer who had accompanied PW.4 at the place of occurrence. He supported the version given by PW.4. PWs.1 and 2 were independent witnesses who attested Ext.P1 mahazar, but they turned hostile to the prosecution. PW.5 was the Excise Inspector who continued the investigation and filed the charge sheet against the accused. PW.6 was the Thondi section Clerk of the Judicial First Class Magistrate's Court III, Neyyattinkara who stated that she had received the articles mentioned in Ext.P5 and had taken samples under the orders of the learned Magistrate.

6. The criticism now raised against the evidence of PWs.3 and 4 is that as PWs.1 and 2, the independent witnesses in whose presence MO.1 can was seized turned hostile to the prosecution, their evidence is not sustainable. It is seen that PWs.1 and 2 had admitted their signature in Ext.P1 mahazar. Though these witnesses stated that they signed the document on the instruction of PW.4 without knowing the contents of the document, that cannot be taken as a ground to contend that PW.4 did not comply with the provisions of the Abkari Act or the Kerala Excise Manual while detecting the crime. There is no rule that the evidence of the investigating officers cannot be made the basis for proving the prosecution case. If the evidence of the investigating officers is sufficient to prove the case against the accused, there is no bar in finding that the prosecution succeeded in proving the case. Apart from the evidence of PWs.3 and 4, the trial court also relied on the evidence of PW.5 who continued the investigation and questioned the witnesses. PW.6 the Thondi section clerk also stated that she had taken sample from MO.1 can and sent the same for chemical analysis. Ext.P6 chemical analysis report proved that the sample analysed contained 27.22 by volume of ethyl alcohol. Accepting the above evidence, the trial court found that the prosecution succeeded in proving that the accused was found in possession of 5 litres of arrack in MO.1 can on the date of the incident.

7. The question to be considered in this appeal is regarding the nature of the offence committed by the appellant.

8. Section 8(1) of the Abkari Act reads as follows:

> **"Prohibition of manufacture, import, export, transport, transit, possession, storage, sales, etc., of arrack:-** No person shall manufacture, import export, transport (without permit transit), possess, store, distribute, bottle or sell arrack in any form."

As per Section 8(2) of the Abkari Act, if any person contravenes any provisions of sub-section (1) of Section 8 of the Abkari Act, he shall be punished with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh. In this context, it has to be noted that "arrack" is defined in sub-section 6A of Section 3 of the Abkari Act as follows:

> "**Arrack"** means any potable liquor other than Toddy, Beer, Spirits of Wine, Wine, Indian made spirit, foreign liquor and any medicinal preparation containing alcohol manufactured according to a formula prescribed in a pharmacopoeia approved by the Government of India or the Government of Kerala, or

> manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietory preparations or approved as a bona fide medicinal preparation by the Expert Committee approved under section 68A of the Act."

9. From the above definition and on the basis of the evidence adduced by the prosecution as well as Ext.P6 chemical analysis report, it is clear that the sample analysed was arrack. If so, the offence committed by the appellant would definitely come under Section 8(1) of the Abkari Act which is punishable under Section 8(2) of the Abkari Act. The trial court proceeded on the assumption that the appellant, having been found in possession of arrack, committed offence punishable under Section 58 of the Abkari Act. Section 58 of the Abkari Act reads as follows:

> "**For possession of illicit liquor:-**Whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing (the duty, tax or rental payable under this Act) not to have been paid therefor, (shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh."

The above section deals with liquor or any other intoxicating drug. Sub-section 10 of Section 3 defines "liquor" as follows:

> "Liquor" includes spirits of wine (arrack), spirits, wine, toddy, beer and all liquid consisting of or containing alcohol."

Even though as per the above definition the word "liquor" includes arrack, that by itself does not mean that the offences under Section 8(1) and 58 of the Abkari Act are one and the same. These two offences are distinct and different, even though after the amendment of the Abkari Act in 1997 the punishments imposed for both the offences are the same.

10. In the light of the discussions made above, this Court is of the view that the finding of the trial court that the appellant committed offence punishable under Section 58 of the Abkari Act is not sustainable. However, this Court finds that the prosecution has succeeded in proving that the appellant was in possession of 5 litres of arrack and hence the appellant committed offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act. The trial court already sentenced the appellant to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to

undergo rigorous imprisonment for a further period of three months. This Court does not propose either to enhance or reduce the sentence imposed by the trial court . However, the rigorous imprisonment for a period of three months in default of payment of fine is altered to simple imprisonment for three months.

With the above modification, this Crl. Appeal is dismissed.

(K.THANKAPPAN, JUDGE)

sp/

C.R.

K.THANKAPPAN, J.

CRL.APPEAL NO.186/07

JUDGMENT

11TH JULY, 2007.